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Theodore Sikora,
Petitioner,
vs. No. 247
The State of Michigan,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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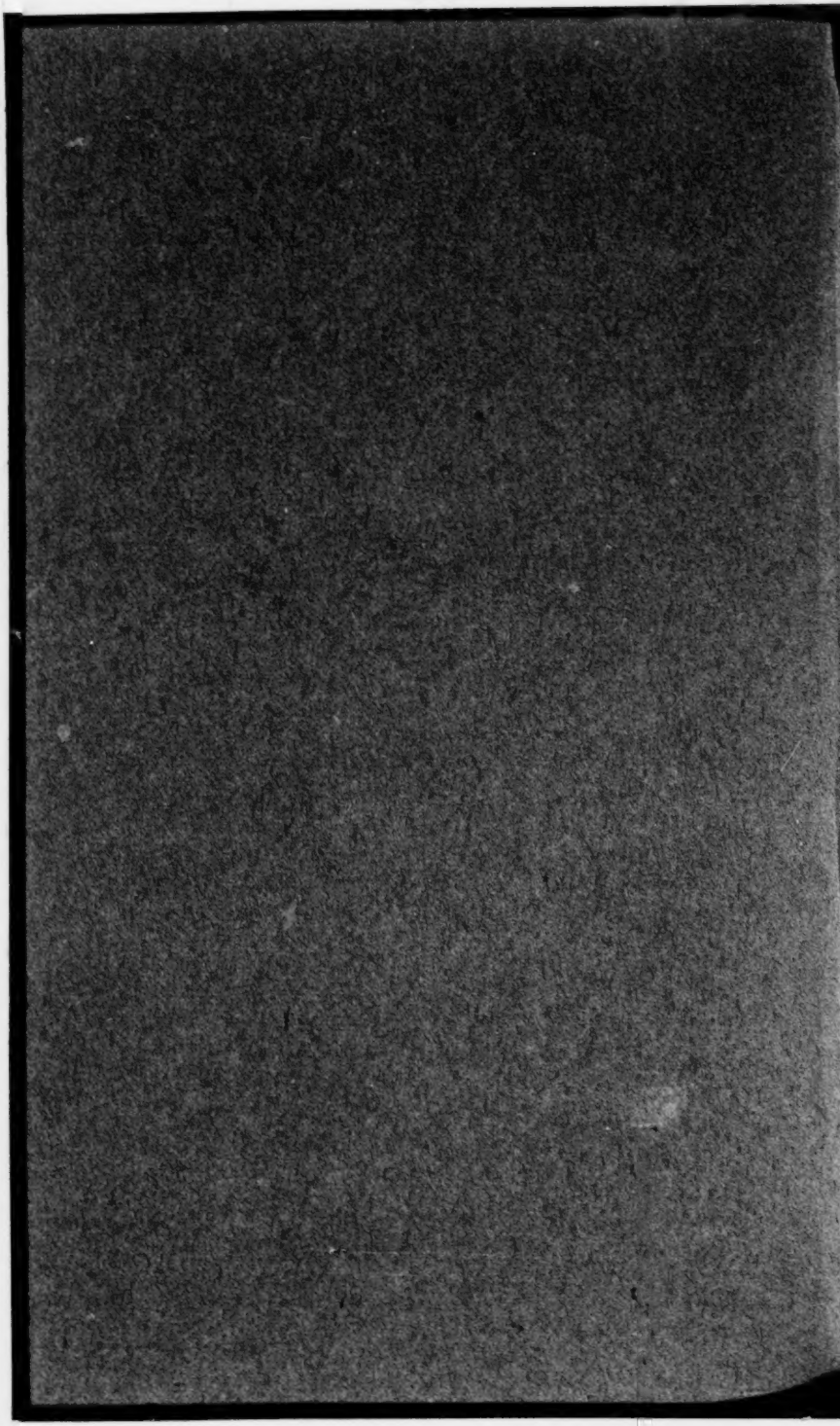

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

THEODORE BENTZ,
Petitioner,

vs.

No. .....

THE STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Theodore Bentz, considering himself aggrieved by an order of the Supreme Court of the State of Michigan entered April 1, 1946, denying his application for a writ of habeas corpus, files this petition praying for an appeal by certiorari of the matters of fact and law from said state appellate court.

Petitioner respectfully shows unto the Court:

That he is imprisoned and restrained of his liberty by the Warden of the State House of Correction and Branch Prison and that he is so imprisoned and detained of his liberty at the said prison in the Township of Marquette, County of Marquette and State of Michigan.

That the cause or pretense of such imprisonment and restraint of your petitioner, according to the best knowledge and belief of your petitioner, is by virtue of a commitment made by the Hon. Fred T. Miles, Circuit Judge, in and for the County of Ottawa. The original commitment is now in the possession of the said Warden and when

produced will show that your petitioner has been committed to said prison for a period of not less than life and not more than life from and including the 25th day of September, 1934. Copy of said commitment is tendered herewith, made a part hereof, and marked Exhibit "1".

That your petitioner is not committed or detained by virtue of process of any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or by virtue of a legal, final judgment or decree of any court of competent civil or criminal jurisdiction, or of any legal executon issued upon such judgment or decree, the time for such restraint being unexpired; or for any treason, felony or other crime committed in any state or territory of the United States for which he, your petitioner, ought, by the Constitution and laws of the United States, to be imprisoned and restrained of his liberty by the executive and administrative power of such state or territory.

SUMMARY AND STATEMENT OF MATTER INVOLVED

In 1934, although he established an alibi which was not discredited, petitioner was found guilty by a jury in the Circuit Court of Ottawa County at Grand Haven, Michigan, of committing robbery armed, upon an information charging him under a different statute. The trial judge forthwith gave him a life sentence. Later petitioner produced new evidence, consisting of two confessions made by two of the real participants absolving him of the crime. Other documentary evidence was also produced. This evidence, positively establishing his innocence, substantially corroborated petitioner's alibi, was tendered with a delayed motion for a new trial. The trial judge, in every instance, arbitrarily denied him the right to have a jury decide the new evidence. The state appellate court, in every instance, tyrannically refused to grant him permission to appeal. Petitioner has been and still is being illegally restrained of his liberty in said prison on a commitment that was made by virtue of proceedings at the trial which were so grossly lacking in elements of fairness and jus-

tice as to result in depriving petitioner of due process of law. The commitment, since it was made, has been shown to be the outcome of a grave miscarriage of justice.

In 1945, after having exhausted every legal remedy by attempted appeals and having been denied in every instance without so much as obtaining a review of the case, petitioner resorted to a collateral attack by habeas corpus. He made and filed an application in the Michigan Supreme Court. He based the application on the facts and law, supported every contention by applicable decisions of this Court.

The Michigan Supreme Court, on April 1, 1946, without issuing the writ and without taking the trouble to write an opinion based upon judicial precedent of this Court, arbitrarily denied petitioner's application for the writ.

The said appellate court, on its order denying the application, asserted petitioner was convicted in a court of competent jurisdiction. Petitioner contends he was not because the trial court, among other things transcended its jurisdiction and therefore rendered its judgment in violation of the Constitution. The state appellate court stated the issues raised by petitioner's application does not constitute ground for granting habeas corpus. This contention should be reversed, because it is not in any way in accord with applicable decisions of this Court, considering the matter as a whole. Further, the state appellate court should be reversed because it has refused in every instance to decide the issues and questions involved in this case, functioning contrary to applicable decisions of this Court.

BASIS OF JURISDICTION

Petitioner is a citizen of the United States by virtue of having been born in East Grand Forks, Minnesota, on the 4th day of July 1903. The jurisdiction of this Court to proceed in this matter is claimed by virtue of that fact and under Section 237 of the Jurisdictional Acts of February 13, 1925 (Chapter 299, 43 Stat. 936), as amended on June 29, 1938 (Sec. 344, U.S.C.).

The trial, conviction and sentence were not in conformity with the Fifth or Sixth or Fourteenth Amendment to the Constitution, nor in accord with Section 16 of Article 2 of the State constitution.

The trial itself was a travesty upon the abiding principles, as practiced in American courts, violated all concepts known to procedural due process.

The right of a state to prescribe its own modes of judicial proceeding is construed in *Bowman v. Lewis,* 101 U.S. 22, 31, but when the essential elements of a court having jurisdiction are not present and the procedure runs afoul of the Fourteenth Amendment, the power of the State over its methods of procedure is substantially restricted by the due process clause of the Constitution. *Jordon v. Massachusetts,* 225 U.S. 167, 176. If the State proceedings are wanting, like in the instant case, in those essentials or of procedural due process, then the United States Supreme Court has jurisdiction to review and reverse the judgment of the state tribunal. *Pennoyer v. Neff,* 95 U.S. 714, 733.

The Constitution does not guarantee that the decisions of state courts shall be free of error. But if the errors are so gross as to be an irrational administration of justice, like in the instant case, it is a denial of due process and the jurisdiction of this Court may be called upon, either by appeal or certiorari, after a convicted person has exhausted his state legal remedies as required by law.

The state appellate court, by virtue of Section 13555, 3 Compiled Laws of Michigan for 1929, is vested with original and appellate jurisdiction to inquire into a conviction by habeas corpus. Weight of authority holds it was required to issue the writ and inquire into the cause. *Roberts v. Reilly,* 116 U.S. 80; *Sharpe v. Commonwealth of Kentucky,* No. 8909 (C.C.A. 6th) 135 F. 2d 974; And see, *Smith v. O'Grady,* 312 U.S. 329, 85 L. Ed. 859, and collated opinions.

The Circuit Court of Appeals for the Ninth Circuit has made the following pronouncement on this point (Graham v. Squire, 132 F. (2d) 681, 683 (C.C.A. 9th — 1942):

> "• • • the Supreme Court intended no more than that the writ of habeas corpus should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof."

The state appellate court ignored this Court's ruling in the *Smith v. O'Grady* case (312 U.S. 329) in connection with the instant case. In that case prisoner made application to the Nebraska Supreme Court for writ of habeas corpus, after eight years imprisonment, on the claim that his incarceration was in violation of the Federal Constitution. In denying the writ the Nebraska court, exactly as did the Michigan Supreme Court in the instant case, held that petitioner's allegations — even if proven in their entirety — would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights. This Court, in reversing the Nebraska court's decision, said:

> "The state court erroneously decided that the petition stated no cause of action. If the petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand."

The Michigan Supreme Court, in connection with the instant case, also ignored the doctrine stated by this Court in the case of *Mooney v. Holohan,* 294 U.S. 103, 113, wherein the court said:

> "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

Moreover, the Michigan Supreme Court ignored the case of *Johnson v. Zerbst,* 304 U.S. 458, 466, among others, wherein this Court held that a person in custody "may have a judicial inquiry * * * into the truth and substance of the causes of his detention * * * (and that) such a judicial inquiry involves the reception of testimony, as the language of the statute shows" (312 U.S. 285, 286).

It is submitted, therefore, to invoke the jurisdiction of this Court in this case is proper and wholly tenable, as provided by law.

QUESTIONS PRESENTED

The said imprisonment and restraint is illegal and contrary to law, and such illegality consists in this, among other things, the following:

1.

(Point One)

That generally the proceedings at the trial and subsequently had were so grossly lacking in elements of fairness and justice as to result in depriving petitioner of due process of law.

(1) The trial court violated the 14th Amendment and disregarded the intention cited in the Michigan statutes, to-wit, in 3 *C. L.* 1929, Sections 17354 and 17355, by denying petitioner the right to have a jury review new evidence obtained by him after diligent and an exhaustive probing to establish the truth and facts of the case, including certified confessions of the genuine participants exonerating this petitioner from any participation or knowledge of the offense involved.

(2) The trial court denied petitioner full recourse to the law and to the inherent precedents of due process guaranteed by Article 2 in Section 16 of the Michigan Constitution.

(3) The trial court denied petitioner equal protection of the law by allowing him to be convicted on testimony which was shown to be deliberately fabricated, prearranged and outlined by the prosecution.

(4) The trial court denied petitioner the rights secured by the Sixth Amendment to the United States Constitution, and also secured by the state Constitution in Section 19 of Article 2, by denying him the right of confrontation of witnesses against him and the right to "cross examine and question them."

(5) The trial court denied petitioner due process by deliberately withholding and excluding evidence pertinent to his defense but damaging to the prosecution.

(6) The trial court denied petitioner the right to a fair and impartial trial by allowing the prosecution to elicit damaging and prejudicial testimony by overstepping the latitude permitted in cross examination of a witness.

(7) The trial court denied petitioner due process by admitting in evidence prejudicial statements by an interested police official and a biased, disgruntled bank employee.

(8) The trial court denied petitioner a fair and impartial trial by admitting matters in evidence not concerning the facts of the cause.

(9) The trial court denied petitioner "notice and opportunity to defend."

(10) The trial court denied petitioner due process by permitting the prosecution to infer before the jury that petitioner was known as a suspected criminal because his picture was in a police rogue gallery, while petitioner was never before convicted for a felony.

(11) The trial court denied petitioner fairness when it disregarded the rules of evidence in connection with its instructions to the jury — by making discriminatory remarks regarding petitioner's alibi witnesses who were all first-rate citizens.

(12) The state through its appellate court has denied petitioner rights provided by the Constitution and the Court's interpretation thereof.

2.

(Point Two)

The Michigan Supreme Court has decided federal questions in this cause in a way not in accord with applicable decisions of this court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) That generally the proceedings at the trial and subsequently had were so grossly lacking in elements of fairness and justice as to result in depriving petitioner of due process of law.

(2) That the Michigan Supreme Court has decided federal questions in this cause in a way not in accord with applicable decisions of this Court and has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, petitioner prays that this Honorable Court will issue its writ of certiorari in this case, to be directed accordingly and returnable forthwith in order that your honors may inquire into the cause or pretense of said imprisonment and restraint, as provided by law, and that petitioner may be relieved therefrom. And he will ever pray.

Theodore Bentz,
Petitioner, Pro Se.

AFFIDAVIT

STATE OF MICHIGAN
SS.
COUNTY OF MARQUETTE

Theodore Bentz, being duly sworn on his oath, deposes and says that he is the petitioner and movant in the foregoing pages of this petition for a writ of certiorari, that the statement and averments above made are true, to the best of his knowledge and belief.

Theodore Bentz,
Petitioner.

Subscribed and Sworn to before me, a Notary Public, this 6 day of June, A.D. 1946.

B. J. Harrington,
Notary Public, Marquette Co., Mich.
My commission expires Aug. 11, 1948.

(Seal)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

THEODORE BENTZ,
Petitioner,

vs.

No. .....

THE STATE OF MICHIGAN,
Respondent.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS

Petitioner was convicted in the Circuit Court of Ottawa County, Michigan, in September, 1934, of committing robbery armed, on an information charging him under a distinctly different statute. He was immediately sentenced to life imprisonment in the state prison. Recently he filed an application for habeas corpus in the Michigan Supreme Court. This was denied on April 1, 1946. He therefore seeks certiorari in this Court, as provided by law. However, to get a clear understanding of the whole matter, reading of a chronological statement of facts is required, as will follow:

STATEMENT OF FACTS

Testimony shows that about 3 o'clock in the afternoon of August 18, 1933, the Peoples Savings Bank of Grand Haven, Michigan, was robbed. Four bandits entered the front door of the bank, as the fifth remained at the back door, while the sixth stayed at the wheel of the "get-away" car. An employee of the bank set off an alarm and the

driver fled with the car. Five of the bandits trapped in the bank herded the customers and employees out at gun point. Four of the bandits in their escape dropped the sack of loot and commandeered an automobile a block from the bank, divesting two women thereof, and fled. They made good their escape. In attempting to escape the remaining bandit, Earl Doyle, was captured, arraigned, pleaded guilty before the Circuit Court of Ottawa County, and was given a life sentence. He is now confined in the House of Correction at Detroit.

During July, 1934 — almost a year from the date of said robbery — Theodore Bentz, alias Theodore Craig Bentz, herein referred to as petitioner, was arrested by federal agents at his business, a pharmaceutical manufacturing plant, in Portland, Maine, in connection with the holdup of June 4, 1934, of the Caledonia National Bank of Danville, Vermont, of which he was subsequently exonerated and released. Upon leaving the federal court in Portland he was arrested by local police and held for the sheriff of Ottawa County, Michigan, who sought to extradite him on affidavits signed by two bank employees to stand trial on an information purporting to charge him with said robbery.

Petitioner protested his innocence and fought extradition, claiming he was not a fugitive from justice, since he never had set foot on the soil of the State of Michigan. Not having any witnesses in Portland, except two F.B.I. agents who failed to appear in court, to prove he was in Chicago, Illinois, when the robbery occurred in Grand Haven, Michigan, petitioner was forced to rely on the testimony of his wife and himself. The result was that the chief executive of Maine, on recommendation of the state's attorney general, ordered petitioner's extradition to Michigan. On August 20, 1934, after a preliminary examination, petitioner was bound over to the Circuit Court of Ottawa County at Grand Haven, Michigan, for arraignment and plea.

On September 20, 1934, petitioner was arraigned on said information. He pleaded not guilty thereto and entered notice of alibi to show he was, at the time the

robbery occurred, in Chicago, Illinois, more than 200 miles away, and would produce witnesses to establish such fact.

In order to avoid confusion petitioner whose name at the time was Theodore Craig Bentz, was tried under the name of Theodore Bentz. Yet the name "Craig" was arbitrarily and constantly mentioned during the trial.

Shortly before the trial petitioner's attorney asked to retire from the case. Without adequate preparation Attorney Elbern Parsons of Holland, Michigan, took over, four days before the trial. He allowed the case to be tried before a jury of 12 whose minds already had been swayed by flaming and untrue newspaper accounts of the petitioner.

The trial convened on September 24, 1934, lasted two days. The trial itself was so grossly lacking in elements of fairness and justice that it deprived petitioner of due process of law. The jury, swayed by the judge's personal opinion and by the unprecedented and devious methods of the prosecution, found petitioner guilty as charged. Upon motion of the prosecutor, the trial judge adjusted himself to impose sentence. He asked petitioner if he had anything to say. Petitioner, deprived of taking the stand by the advice of his counsel, vigorously protested his innocence in the following words;

> "THE COURT: You may stand up here with the Sheriff. Anything you want to say on the record, Mr. Craig, why the sentence of the court should not be pronounced in your case?
>
> MR. BENTZ: What I have got to say is that I am innocent of this offense, and it will be on your conscience, boys, all your lives. I never robbed this bank, and it will be proven sooner or later. That is all I have to say (T. 163)".

The trial judge disregarded this statement and made some immaterial remarks. Petitioner again declared: "MR. BENTZ: Judge, I never robbed this bank" (T. 164). The judge thereupon imposed a life sentence for robbery armed, a distinctly different crime than that charged in the information.

Although 30 persons claimed to have seen the robbery the State produced only eight witnesses, six of them were bank employees. Four employees of the bank, who had been coaxed and directed by the prosecutor and induced by a certain detective and a certain police officer to name the petitioner as being one of the robbers, identified petitioner tentatively before the trial and positively on the trial. Each of these witnesses had been shown a picture of petitioner before the trial, at which time they were induced to identify it as being one of the bandits. Each of these witnesses fabricated their testimony which was so inconsistent and contradictory that a fair and impartial trial was impossible, unless they had have been rebuked by the trial judge who did nothing about it. Defense counsel who was wholly inadequately unprepared to try the case and who had not made an investigation of any kind to ferret out essential facts appeared at a loss to protect petitioner's fundamental rights in the proceedings.

The cashier of the bank, Mr. Bolt (T. 71-78) and the auditor, Mr. Lindemulder (T. 84-86), both of whom saw the bandits and were, according to their testimony, alongside other witnesses in the bank, testified petitioner was *not* one of the men they saw during the robbery.

The State produced a Mr. Evans who alleged petitioner cashed a travelers' check in payment for a hat in Hammond, Ind (T. 81-83). No witnesses were produced who could properly show such check was in the bank at the time of the robbery. Evans' testimony was inadmissible. The trial court had no jurisdiction to hear such matter; for it was a separate matter, if a crime, which occurred in another state. Allowance of Evans' testimony was a traverse upon petitioner's just rights to a fair trial.

The last witness to give direct testimony for the State was the chief of police of Grand Haven, a Mr. DeWitt (T. 88-90), whose testimony was highly prejudicial because it deprived petitioner of the right to remain silent on the presumption of innocence.

As alibi witnesses petitioner produced three business men from Chicago. They testified that they positively

saw petitioner in Chicago between the hours of noon and 3:30 P. M. and again later in evening, and that therefore his participation in the robbery on Friday, August 18, 1933, would have been an impossibility. These witnesses were not discredited (Bailey, T. 96-100; Shugan, T. 109-112; Knuth, T. 122-124). Petitioner's wife, Christina, also testified in his behalf. She testified that she was with him all day during the day in question, and that he was in Chicago and not in Michigan at all (T. 138-142). The state did not produce any testimony to disprove the testimony of these witnesses, nor could the state do so. For when you deal with truth you deal with something that cannot be shaken.

Petitioner also produced Earl Doyle, one of the participants who was captured at the scene of the robbery. He was brought from prison to testify. Doyle testified that he participated in the crime, knew each and every one of the participants, and that petitioner was not one of them nor was the petitioner involved. And, moreover, the petitioner was a stranger to him (T. 133-134).

John DeKoster then testified, said that one day after the robbery, while he was in the bank of business, two of the bank employees remarked that he resembled the taller of the first two bandits to enter the bank (T. 136). It is significant to note, petitioner is accused of being the taller of the first two bandits to enter the bank. In his instructions to the jury the trial judge remarked that he did not think such testimony had any bearing on the case (T. 153). But obviously this influenced the jurors and consequently played some part in divesting petitioner of a fair trial.

The proceedings at the trial, generally, were so grossly without the elements of fairness and justice that the result of them deprived petitioner of due process of law. Due process was flippantly disregarded at almost every stage of the trial. There was bias; hate and opinionated conceit predominating the court room in this case, not the sane, equitable conduct and fairness known to American jurisprudence. Since the facts constituting a substantial deprivation of due process shall be set out with each point,

we need not look at them at the moment. However, the record alone shows patently what proceedings lacked.

After the trial judge had given his instructions to the jury, and they retired to deliberate their verdict, the jurors asked for some information as to a certain date on a travelers' check. The trial judge, against all precedents, reopened the case for the prosecution and deprived the defense of any opportunity to reply. With that, some hours later, the jury brought in a verdict of guilty. That was on September 25, 1934, and the judge forthwith sentenced petitioner to do a life sentence in prison.

In January, 1936, petitioner filed a delayed motion for a new trial and supplemented it by another similar motion filed during May of that year. These motions, taken as one, were denied by the trial judge on December 31, 1938. A few days later the trial judge, still holding to his denial, supplemented his opinion. No appeal was taken therefrom, although it was begun.

In August, 1942, a similar motion was made and filed in the same court, supported by new evidence showing petitioner was absolutely innocent of the robbery. This motion was arbitrarily denied for similar reasons, notwithstanding the fact that the leader of the participants in the robbery had in the meantime been apprehended — and, by a notarized confession, fully corroborated by Doyle and by the Michigan State Police, totally exonerated petitioner from any blame, participation or knowledge in the robbery in question.

From this denial petitioner made a timely appeal to the Michigan Supreme Court upon an application for leave to appeal as procedural methods require in Michigan. The said appellate court, without giving any reason whatever, denied petitioner leave to appeal. The order of denial is dated April 6, 1943. Petitioner motioned the same court for a rehearing. This, too, was denied, on May 19, 1943.

Thereupon petitioner asked this Court for leave to appeal and was denied for failing to file the appeal within the statutory time allowed for appeals. See *Bentz v. State of Michigan*, 64 S. Ct. 33, 85.

Thereupon petitioner made and filed an application for a writ of habeas corpus in the Michigan Supreme Court. The application was denied on April 1, 1946, in a way not in accord with the applicable decisions of this Court.

ARGUMENT AND THE QUESTIONS PRESENTED, CONSTITUTING VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

The following will clearly show why and how petitioner's constitutional rights were wantonly and arbitrarily disregarded denying him due process of law and full recourse to the law of the land, during the trial and during subsequent correctional process, which the State of Michigan consistently refused to allow.

1.

(Point One)

Generally the Proceedings at the trial and subsequently had were so grossly lacking in elements of fairness and justice as to result and did result in depriving petitioner of due process of law.

At one time on habeas corpus the court was confined to the record of the trial court.[1] The record was not subject to impeachment or contradiction, but imported absolute verity. Extrinsic evidence was inadmissible. The procedure was, however, liberalized and these barriers abrogated by the Act of February 5, 1867.[2] This statute radically modified habeas corpus procedure by permitting the court to determine the facts and to hear testimony for that purpose. The Act of 1867 constitutes a landmark in the development of habeas corpus procedure and its salient provisions may well be recognized.[3] By virtue of this statute the prisoner may have a searching judicial inquiry into the truth and substance of the causes of his

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[1] Ex parte Watkins, 3 Pet. 193, 202; Frank v. Mangum, 237 U. S. 309, 330-331 (1915).

[2] 14 Stat. 385.

detention, even though it may become necessary to look behind and beyond the record for that purpose. Facts deemed jurisdictional may be scrutinized irrespective of whether or not they appear in the record. Evidence of extrinsic facts is admissible.

At one time it was held that this provision authorized inquiry into the facts outside of the record only if the facts supplemented the record but did not contradict it. Evidence of facts inconsistent with the record was still deemed inadmissible.[4] This limitation, which seems somewhat artificial, appears to have been discarded and no longer fetters the courts in their search for the truth. The petitioner on habeas corpus "may have a judicial inquiry * * * into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction."[5] In that case the testimony was held admissible to overcome the presumption of regularity which the record of the trial imported.

The next step in the direction of broadening the scope of review on habeas corpus was taken in *Mooney v. Holohan*, decided by this Court in 1935.[6] The case involved a motion in the Supreme Court for leave to file a petition for habeas corpus. The applicant was a prisoner serving a sentence in a State penal institution for murder of which he had been convicted in a State court. It was charged by the petitioner that the State held him in confinement without due process of law in violation of the Fourteenth Amendment. The court denied the application without prejudice, on the ground that defendant had not exhausted his recourse to judicial remedies afforded by the State.

The *cause celebre* of *Johnson v. Zerbst* was decided by the Supreme Court in 1938.[7] It is a leading case in the

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[3] U. S. Code, title 28, secs. 454, 456, 460 and 461.

[4] Riddle v. Dyche, 262 U. S. 333.

[5] Frank v. Mangum, supra, 331. This expression was quoted with approval in Johnston v. Zerbst, 304 U. S. 458, 467.

[6] 294 U. S. 103.

[7] 304 U. S. 458.

field of constitutional law, in connection with the interpretation of the provisions of the Sixth Amendment. The Court indicated that if it were found from the evidence that the petitioner had sustained the burden of proof resting upon him on that issue raised, it would follow that the trial court did not have jurisdiction to proceed to judgment and conviction of the petitioner. The reasoning of the court is revealed in the following statements contained in its opinion:[8]

> "True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities — not involving the question of jurisdiction — occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve — not destroy — constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened — not narrowed — since the adoption of the Sixth Amendment."

It will be observed that the orthodox concept of jurisdiction was greatly expanded and enlarged. First, it was enunciated that although the court may have jurisdiction at the beginning of the trial, the jurisdiction may be lost in the course of the prosecution, rendering the court without power to proceed to judgment. Second, fulfillment of the guarantee of the rights deemed fundamental was deemed a jurisdictional requirement. The basis for this conclusion was that if a guarantee is not provided for an accused who has not intelligently waived it, there is a failure to complete the court. The conclusion is then logically deduced that an incomplete court is without power to act, just as presumably would be the case of a court without a jury in cases in which the trial must be with a jury.

In *Walker v. Johnson*, decided in 1941,[9] the Court reinforced and expanded the conclusions reached in *Johnson*

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[8] Pp. 456, 468.

[9] 312 U. S. 275.

v. Zerbst. A week later the Court decided the case of *Smith v. O'Grady,*[10] in which resort was had to a petition for a writ of habeas corpus by an inmate of a State prison serving a sentence imposed upon him by a State court. He claimed that by means of deception practiced by the prosecuting attorney he had been inveigled into pleading guilty to a charge of burglarly with explosives for which he was sentenced to imprisonment for a term of twenty years. He contended that he had pleaded guilty by prearrangement with the prosecuting attorney on the basis of an agreement that the sentence would be for not over three years. This Court held that in the light of the surrounding circumstances, if these things happened, the petitioner was imprisoned under a judgment invalid because obtained in violation of procedural guarantees protected against State invasion by the Fourteenth Amendment. It concluded that the petition set forth sufficient grounds for granting a writ of habeas corpus.

The case of *Waley v. Johnston,* decided in 1942,[11] is the next milestone to be noted. The conclusion was reached that the application for *habeas corpus* was sufficient. The chief principle involved was formulated by the court as follows:[12]

"The issue here was appropriately raised (denial of due process) by the *habeas corpus* petition. The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore v. Dempsey,* 261 U. S. 86; *Mooney v. Holohan,* 294 U. S. 103; *Bowen v. Johnston,* 306 U. S. 19, 24."

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[10] 312 U. S. 329.

[11] 316 U. S. 101.

[12] P. 104.

The latest utterance of this Court on this subject is found in the opinion in *Pyle v. Kansas,* rendered in December 1942.[13] The case involved an application to a State court for a writ of habeas corpus to review a judgment of conviction pursuant to which the petitioner was incarcerated in a State prison. The matter reached the Supreme Court on certiorari to the highest court of the State. The petitioner's contention was that he had been convicted as the result of perjured testimony, known by the prosecuting authorities to have been false, and by the suppression of testimony favorable to him. It was further asserted that several of the witnesses had been coerced into testifying falsely against him. The court held:[14]

> "These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan,* 294 U. S. 103."

A striking feature of several of the cases that have just been discussed is that they involved no infirmity in the judicial proceeding proper. Nothing done or left undone by the court and nothing in the constitution of the court led to invalidating the judgment. The collateral attack on the conviction was based on and sustained solely because of the sins of the prosecuting and law enforcement authorities, committed outside of court. It would seem to follow that jurisdiction of a court may be lost after it has once attached not only by defective constitution of the tribunal or by actions or failure to act on the part of the court, but also by illegal activities of prosecuting and law enforcement officers outside of the court and of which the court may not even be aware.

The doctrine that the rule of *res judicata* does not apply in habeas corpus proceedings is retained.[15] A petitioner is permitted to advance and litigate any new point on the

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[13] 317 U. S. 213.

[14] P. 216.

[15] Waley v. Johnston, 316 U. S. 101, 105.

second application.[16] After issues of fact are raised, testimony may be presented either orally or by deposition.[17] On the return to the writ the defendant must be produced in person before the judge, who is required to hear the prisoner and other witnesses himself and may not refer the case to a commissioner or a master, is the rule.[18] In reviewing an order in a habeas corpus proceeding, an appellate tribunal is not bound by the findings of fact of the lower court. All questions of law or fact arising upon the record are open to consideration *de novo*.[19]

At this point it may be tenably said that if the error or errors led to a failure of the trial court to obtain jurisdiction or to a divesting of jurisdiction by reason of subsequent events, *habeas corpus* on collateral attack is proper.

The Circuit Court of Appeals for the Ninth Circuit has made the following pronouncement on this point:[20]

> "* * * the Supreme Court intended no more than that the writ of *habeas corpus* should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof."

ARGUMENT ON QUESTIONS SUPPORTING THE ALLEGATION

(1) Confessions from two of the bank bandits who freely and openly admit their guilt, corroborated by other new evidence, showing petitioner had nothing to do with robbing of the bank, is conclusive that justice has not been

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16 Adams v. United States, ex rel McCann, 320 U. S. 220.

17 Walker v. Johnston, 312 U. S. 275, 285.

18 Holiday v. Johnston, 313 U. S. 342 (1941).

19 Carruthers v. Reed, 102 F. (2d) 933 (C. C. A. 8th—1939) cert. den., 307 U. S. 643.

20 Graham v. Squire, 132 F. (2d) 681, 683 (C. C. A. 9th—1942).

done.[21] The State violated the 14th Amendment by denying petitioner the right to have a jury review this evidence, acquired through years of diligent search and exhaustive probing, the following:

(A) F. B. I. Agents Thompson and Keefe, after a thorough investigation, positively stated petitioner was in Chicago all day during the day of the robbery. This fact the trial court ignored (See Exhibit "I").

(B) In 1936 Edward W. Bentz, a fugitive from justice, was arrested in New York. He, on April 22, 1940, signed, freely and of his own will, a complete, detailed confession and minute description of the identities and movements of all the participants in the robbery, completely absolved this petitioner from having taken any part or having any knowledge of the crime. (See Exhibit "A"). In the opinion denying motion the trial judge said, "It is hardly possible that any jury would be influenced by the testimony or deposition of a witness of this character."

This Court held that a confession if freely and voluntarily made, is evidence of the most satisfactory character, cannot be ignored.[22] Edward Bentz' confession was corroborated by Earl Doyle's attestation (See Exhibit "C"). It was also corroborated by an investigation made by Lt. P. L. Hutson, of the Michigan State Police, who absolved petitioner of the robbery after investigation was made. It was further supported by testimony of Mrs. Verna Bentz (Exhibit "D"), Rose Kelso (Exhibit "E"), and Roy Kelso (Exhibit "F"), set out in affidavits, to-

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[21] Sec. 17354 & Sec. 17355, Comp. Laws Mich. 1929.

[22] Hopt v. Utah, 110 U. S. 574, 583, wherein this Court said:
"A confession if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C.B., 1 Leach 263, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.'
"Elementary writers of authority concur in saying that, 'while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession'—citing 1 Greenleaf, Ev. Section 215; 1 Archbold, Cr. Pl. 125; 1 Phillips' Ev. 533, 534; Starkie, Ev. 73.
"Any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession."

gether with Ed's additional attestation labeled "Testimony In Error," included in record of "*New Evidence Acquired Since the Trial.*"

These pertinent facts were disregarded by trial judge in a way not in accord with the applicable decisions of this Court. His action was arbitrary,[23] despotic.[24]

Where the concept of due process is concerned an adverse decision cannot rest upon the opinion of one judge. For it is not the intent of the framers of the Constitution to sustain imprisonment of an innocent person.

The trial judge's statement disparaging the alibi was not justified, is a transcendency of jurisdictional judgment. The alibi witnesses were of impeccable character. Their testimony was corroborated by petitioner's wife. The State failed to discredit the alibi. The alibi met every requirement of the law,[25] was ignored. Moreover, the trial judge transcended the concepts of due process by ignoring Exhibit "H", consisting of corroborative evidence indicating petitioner's innocence, which was presented with the motion.

Further, the trial judge disregarded Exhibit "I", consisting of evidence showing the F. B. I. were satisfied petitioner had no part in the Grand Haven robbery here in question. The above facts show that the elements of due process are so grossly lacking in the trial judge's administration of justice in procedure following the trial as to constitute transcendency of jurisdiction, a deliberate denial of the fundamental right to have the evidence heard

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23 Smith v. O'Grady, 312 U. S. 334.

24 McNabb v. United States, 63 S. Ct. 608.

25 Fielder v. United States, 227 F. 832.

by a jury of one's peers, as guaranteed by Article 5 of the Constitution.[26]

(2) During and after the trial petitioner discovered that the prosecutor withheld from defense counsel and petitioner material evidence favorable to defendant on trial. Failure of prosecuting attorney to indorse on the information the names of witnesses and produce them at the trial is not a mere irregularity. It is a positive evasion of a substantial right.[27]

Petitioner properly claimed such failure constituted after-discovered evidence.[28] For it denied a fundamental right.[29]

What is this evidence? While four of the bandits were fleeing from the robbery they stopped Mrs. Louis Bonema and Mrs. Joe Miller who were riding in an automobile. They snatched the car away from them to further their escape. At the same time, Mr. & Mrs. G. G. Murray, rid-

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[26] Chambers et al v. State of Florida, No. 195, 60 S. Ct. 472, wherein the Court made the following observation:

"The 'due process' clause of Article 5 of the United States Constitution and fundamental rights of the Fourteenth Amendment, was intended to guarantee procedural standards adequate and appropriate to protect at all times people charged or suspected of crime by those holding positions of power and authority.

"Under our Constitutional system, the court is a guard against any winds which may blow; a haven of refuge for those who might otherwise suffer; because they are helpless, weak, outnumbered, or because they are non-conforming in time of prejudice and public excitement. Due process of law is preserved for all by our Constitution and commands that no person shall be deprived of his liberty unless he shall first have had the entire resource of the court trial. The higher duty of a court is solemn responsibility in seeing justice done, not being the tool of influential persons, or groups but a living shield translated into maintaining this constitutional proviso, inscribed for the benefits of every human being whatever his creed or race."

But see, too, McNabb v. U. S., 63 S. Ct. 608, wherein this Court pointed out: "Experience has therefor counseled that safeguards must be provided against the danger of over-zealous as well as the despotic. The awful instrument of criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. It outlaws easy but self-defeating ways in which brutality is substituted for brains or an instrument of crime detection."

[27] Section 15761, Comp. Laws Mich. 1915; Sec. 17254 C. L. Mich. 1929; construed in People v. Blazenzitz, 212 Mich. 675.

[28] Clark, Handbook on Crim. Proc. page 587; 3 Wharton, Crim. Proc., 10th Ed., Sec. 1799.

ing in an automobile, approaching from the opposite direction, saw the episode and the bandits. None of these persons was either indorsed on the information or called to the trial. Some distance from Grand Haven, where the bank is located, the four bandits commandeer a car from Mrs. Oscar Varneau. Her husband, who was at the door of a farm house, saw the men, came running to aid his wife. In the face of guns they could do nothing, except make a good mental picture of the bandits who fled with their Chrysler. Of the above witnesses the prosecutor knew, failed to call them because he knew they would testify that petitioner was not one of the bandits.

Just north of Adrian, Michigan, during the same evening of the robbery, these same four bandits commandeer a Ford driven by Gordon Heximer. There were three other occupants in that car. All four of these persons saw the bandits face to face. Yet these witnesses, known to the police on the case, were neither indorsed on the information nor called to the trial by the State.

Ten res gestae witnesses, all of them known to the police and prosecution, were concealed from petitioner because these witnesses could only be instrumental in proving petitioner's innocence. Moreover, a Mr. Van Lopik, a Mrs. Sargent, and a Miss Correll who were present when the robbery occurred and who saw every bandit in the bank were neither indorsed on the information nor called to the trial by the State who concealed them from the defense.

The collateral attack on the conviction can be based on and sustained because of the sins of the prosecuting and law enforcement authorities, committed outside of court. It follows that jurisdiction of the court may be lost after it has once attached by actions or failure to act on the part of the court, as well as by illegal activities of prosecuting and law enforcement officers outside of the court and of which the court may not even be aware.

(3) Where the evidence of facts is as consistent with innocence as with guilt, it is insufficient to sustain a con-

viction.[30] A verdict cannot rest on a mere preponderance of conflicting evidence,[31] as the testimony of the four employees (Pellegrom, Meschke, Welling, and Bugelski) who were induced by Lt. P. L. Hutson to identify petitioner as being one of the bandits. Petitioner was not required to fully establish an alibi to have, at least, the benefit thereof.[32] Testimony relative to an alibi creates a reasonable doubt as to defendant's guilt.[33] The trial judge, in the protection of defendant's constitutional rights, was required to instruct jury that, in view of his alibi, he should be given benefit of any doubt and to find him not guilty.[34] Petitioner was divested of the benefit of the principle of reasonable doubt.[35] Where the scales of justice may be delicately poised between guilt and innocence, and in that event errors which under some circumstances would not be ground for reversal cannot be brushed aside as immaterial.[36] The burden of proof was not on the petitioner to establish his alibi by the preponderance of the evidence. Because it raised reasonable doubt, his acquittal was imperative.[37] Even if petitioner had failed to establish his defense of alibi — although he did not fail since reasonable doubt prevailed — it was imperative for the jury to return a verdict of not guilty.[38] Thus, as established law holds, the jury must also hold — otherwise equal protection of the law has not been provided the accused .

(4) Failure of the State to provide confrontation of witnesses P. G. McCoy, T. E. Matheson, and C. C. Troyano, out of state witnesses against petitioner, violated both

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29 Sec. 16, Article 2, Constitution of Michigan; United States v. Ashe, 2 F. (2d) 735.

30 U. P. v. U. S., 173 F. 737; Williams v. U. S., 286 F. 852.

31 People v. Slight, 48 Mich. 54.

32 People v. Marvill, 236 Mich. 595.

33 People v. Marvill, supra.

34 People v. Resh, 107 Mich. 251.

35 U. S. v. McHugh (D. C. Wash.) 253 F. 224.

36 Glasser v. United States, 62 S. Ct. 457.

37 Falgout v. United States, 279 F. 513.

38 McCool v. United States, 263 F. 55.

state and federal constitutions.[39] The witnesses, supra, indorsed on the information, must be called. Otherwise the evidence to which they could give testimony must be excluded. The evidence was not excluded as required but was arbitrarily superinduced into the trial to deprive petitioner of due process. State claims a stipulation was made to satisfy this. The stipulation by counsel to waive these witnesses was invalid because the prosecutor violated its terms. Some courts hold that the privilege of confrontation may not even be waived.[40] Denial of the privilege falls short of due process of law.[41]

(5) (A) Counsel could not, consistently with due process, make a stipulation in this case, regardless of whether petitioner ratified it, since the evidence on which it was based deprived petitioner of a fair trial.[42] Chiefly because it divested petitioner of the right of confrontation.[43]

(B) Witness DeWitt, chief of police of Grand Haven, consistently with due process and equal protection of the laws, could not withhold material evidence tending to support petitioner's innocence. This witness made a trip to Chicago to investigate petitioner's alibi, uncovered the fact petitioner had called on two stores located in the building where petitioner resided on the day of the robbery. Petitioner, since a year had passed, had forgotten of these calls. When Witness DeWitt returned to Grand Haven from Chicago and called upon petitioner at the jail, the petitioner questioned him. Asked if he had uncovered any new evidence of innocence, DeWitt—eluding petitioner's eye—lied and said he did not and refused to discuss the matter any further. After the trial, however, petitioner had his friends investigate and discovered these witnesses could corroborate the alibi to make it conclusive (See Exhibit Pages 86-90. New Evidence). DeWitt had deliberately

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39 Art. 2, Sec. 19, Const. Mich.; Art. 6, Const. of U.S.

40 Snyder v. Commonwealth of Mass., 291 U. S. 97.

41 Dowdell v. United States, 221 U. S. 225.

42 Snyder v. Commonwealth of Mass., 291 U. S. 97, citing Boel v. Comm., 135 Va. 600, 619, 30 A. L. R. 1345.

43 Art. 2, Sec. 19, Const. of Mich; Art. 6, Const. of U. S.

suppressed this evidence and acted contrary to his sworn duty, divesting petitioner of evidence in his favor.[44] Since the State alone cannot act the act of an officer as an agent of the State is the Act of the State.[45]

(C) During the trial, over the objection of defense counsel witnesses for petitioner were excluded from the court room. The trial court cannot, consistently with due process of law, exclude from the court room witnesses for the defense after witnesses for the prosecution already had testified and had been present during the testimony of each other (R. 100).[46] It did not provide a fair trial.

(6) The trial court divested petitioner of right to a fair and impartial trial by allowing prosecutor to illegally elicit from petitioner's wife damaging and prejudicial testimony on matters not concerned with the case (R. 142). Wife of petitioner could not be cross-examined on matters not germane to her examination in chief.[47] Especially where purpose of questions was to cast suspicion.[48] Such unfair method causes the trial to result in a miscarriage of justice.[49] It denies due process of law.[50] Failure to object is irrelevant. This Court notices errors to which no exception has been taken if they would "Seriously affect the fairness, integrity, or public reputation of judicial proceedings."[51] The transgression on petitioner's rights was more than a denial of fundamental concepts of justice; it was an indictment against the whole nation, for it is contrary to the established standards of procedural due process.[52]

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44 Ex parte Virginia, 100 U. S. 339, 347; 14th Amendment.

45 Ex parte Virginia, supra.

46 Sec. 145, Clark, Handbook on Crim. Proc., P. 489.

47 1 Wharton, Crim. Ev. (10th Ed.) Sec. 480, Chap. 9, p. 992.

48 Gale v. People, 26 Mich. 157.

49 People v. Cahoon, 88 Mich. 456.

50 Palko v. Connecticut, 302 U. S. 319, 325, 327; Berger v. United States, 295 U. S. 78, 89.

51 U. S. v. Atkinson, 297 U. S. 197; Johnson v. U. S., 63 S. Ct. 555.

52 14th Amendment and its interpretations.

The unfairness was increasingly intensified by the trial judge in his partial instructions to the jury (T. 154, 155) lacking in elements of due process, made the whole trial *ad nauseam*.

7 The trial court denied petitioner due process by admitting in evidence prejudicial statements by an interested police officer and a biased, disgruntled bank employee.

(A) Prejudicial remarks by witness Pellegrom, a bank employee (31), divested petitioner of a fair trial. Even if stricken, and the jury cautioned not to be influenced thereby, its effect could not be obviated.[53] Pellegrom inferred that petitioner had changed his name whenever the occasion called for it, thereby poisoning the minds of the jurors and its affects could not be erased from their memories, made the trial unfair.[54] Trial judge must protect rights of the accused, failed. Failure of counsel to object cannot be imputed to petitioner. For a defendant is not responsible for omissions of counsel upon whom he must rely.[55] Nor is the accused, under the circumstances, required to make motion to strike out unfair matter. Allowance of inadmissible testimony vitiates verdict of jury, and a commitment made thereon is therefore without force.[56] Pellegrom's remarks were deliberately designed to pollute the ears of the jurors, for the record is absolutely barren of any fact to show where Edward Bentz, petitioner's brother, ever used the name of "Craig". And a trial, wherein the court permits prosecution to take untair advantage of accused, is grossly lacking in elements of due process, invalidates jurisdiction.

(B) Testimony of police officer DeWitt (88, 89) deprived petitioner of a fundamental right to remain silent, was highly prejudicial and unfair. For petitioner could not have answered DeWitt's allegations without taking the witness stand. Moreover, the trial court failed to determine, without presence of jury, whether or not alleged

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53 People v. Wolcutt, 51 Mich. 612.

54 State v. Rothschild, 68 Mo. 52.

55 People v. Durrant, 116 Cal. 179.

56 Reg. v. Gibson (Eng.), 7 Am. Crim. Rep. 171, 173.

admission of having travelers' checks was voluntarily made after the constitutional requirement was spoken by DeWitt — which, of course, was not. DeWitt could not be a direct witness. He could not be a witness at all, unless defendant had taken the witness stand. The State cannot ignore its own judicial interpretations.[57] A deprivation of a right deemed fundamental by law invalidates proceedings had, and any mandate arising therefrom is made without jurisdiction, has been established.

(8) The trial court divested petitioner of a fair trial by admitting in evidence matters not concerning the facts of the case. As before stated, the stipulation was invalid.[58] The prosecutor, breaking the terms of it, introduced in evidence two bundles of photostatic copies of travelers' checks allegedly in possesssion of the bank on the 18th of August 1933, claimed they were stolen during the robbery (75-78). In his instructions to jury trial judge admitted this evidence was incompetent (R. 159). Prosecution could not show corpus delicti of crime thereby. For there was no proof to show petitioner ever had possession of them.

The testimony of witness Evans (R. 81-84) was evidence of another crime, without the jurisdiction of the trial court, could *not* be used to show, or have jury presume, the corpus delicti of crime was eventuated or that petitioner participated therein.[59] If the accused is not tried in accordance with the established canons of law, due process is not satisfied.[60]

(9) The trial court divested petitioner of notice and opportunity to defend, among other things, and transcended its jurisdiction.

(A) Petitioner was charged by information with the crime of "bank robbery" under Sec. 531, Act 328, Public

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[57] People v. Courtney, 179 Mich. 137.

[58] Young v. U. S., 315 U. S. 259.

[59] Sec. 150, Underhill, 3rd Ed. Crim. Evidence.

[60] Twining v. New Jersey, 211 U. S. 78, 101; Butler v. Perry, 240 U. S. 328, 333.

Acts of Michigan for 1931. He is sentenced and committed to prison for the crime of "robbery armed" under Sec. 529, Act 328, supra. Failure of information to charge offense for which prisoner is sentenced invalidates both conviction and sentence.[61]

(B) Information fails to comply with rule of "ejusdem generis", contrary to requirements of law.[62]

(C) Testimony offered by prosecution shows four or five men participated in the offense. Information charges petitioner with having committed it alone, and not with aid of someone else. The act of the State in so charging constitutes a variance between the pleadings and proof.[63] These matters had not arisen until during the trial. Petitioner had been denied notice of them. Thus it was impossible for him to make an objection thereto prior to the trial. The State, through its courts, denied petitioner process as construed by its own judicial decisions,[64] and the trial court had denied him of notice and opportunity to meet the unexpected. Measured by this standard, what conclusion follows? Petitioner's conviction obtained contrary to the State's own decisions, by virtue of denying him the necessary relief, is in violation of the United States Constitution. For, as shown, if the State insists its law be complied with, the citizen charged and held for

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61 People v. Frencavage 231 Mich. 242; People v. Brown, 299 Mich. 1, 4, 5; People v. Eger, 299 Mich. 49, 55 & 56, and People v. Ept, 299 Mich. 324.

62 People v. Brown, supra; Gooch v. U.S., 56 S. Ct. 595; 3 C. L. Mich. 1929, Sec. 17259.

63 1 Wharton, Crim. Ev., 10th Ed. 279; People v. Quider, 172 Mich. 285.

64 United States v. Ashe, 2 F. (2d) 735, wherein the court said: "We know that the state can go very far in exercise of its sovereign power, in the passage of laws regulating procedure, evidence, and methods of trial, not in conflict with the federal constitution.

"(4, 5) These powers, and very many more, some of which are summarized by Justice Moody in the case of Twining v. New Jersey, 211 U. S. 78, 29 S. Ct, 14, 5 L. Ed. 97, the state in the exercise of its sovereignty may lawfully exert, and the laws and modes of procedure which the state establishes, every citizen thereof is bound to obey. To him they become 'the law of the land.' As was said by Chief Justice Waite, in Walker v. Sauvinct, 92 U. S. 90, 23 L. Ed. 678, 'Due process of law in process in the states is regulated by the law of the state.' From the duty of the citizen to insist that the state comply with its own laws, and to demand, in the language of the Constitution of the state, that he be not deprived by the judgment of his peers or the law of the land."

a crime may also insist that the State comply with its own laws.[65]

(10) The trial court divested petitioner of due process by permitting the prosecution to infer before the jury that petitioner was known as a suspected criminal because his picture was in a police rogue gallery, while petitioner was never before convicted for a felony. The State cannot, consistently with due process of law, divest an accused of a fair trial by unholding an invalid conviction obtained in a trial during which prosecutor created prejudicial error (R. 148) by arguing matter of which there was no evidence.[66] While the prosecutor is at liberty to strike hard blows, he is not at liberty to strike foul ones.[67] Objection was timely made and was overruled (R. 147-148). The "foul blow" was intensified by the trial judge's remark that it was "a legitimate argument".[68] Where prosecuting attorney comments on matters not in evidence, the conviction may be voided.[69]

(11) The trial court divested petitioner of a fair trial when it disregarded the rules of evidence in connection with its instructions to the jury — by making discriminatory remarks regarding petitioner's alibi witnesses and by giving undue prominence to the State's side of the case.

(A) In his charge the trial judge cannot, consistently with due process of law, refer to the accused as an aider and abetter when such is not charged in the information.[70] (R. 150).

(B) DeWitt's testimony, because of its inadmissibility, required trial judge to exclude it from his in-

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[65] United States v. Ashe, supra.

[66] Sec. 172, Clark, Handbook on Crim. Proc. p. 539-541; People v. Allen, 299 Mich. 242.

[67] Berger v. United States, 295 U. S 78.

[68] People v. Fielding (N.Y.) 11 Am. Crim. Rep. 88, 97, wherein the court said that "approval of prejudicial remarks by a trial judge intensifies the effect."

[69] Clark, Handbook on Crim. Law & Proc., Sec. 172, pp. 539-541; People v. Reid, 295 Mich. 574, 575.

[70] 1 Wharton, Crim. Ev. 10th. 279; People v. Quider, 172 Mich. 285; Meister v. People, 31 Mich. 98, 111.

structions to the jury (R. 152). Failure to exclude it divested petitioner of a fair trial.

(C) The trial judge, already having deprived petitioner of a fair trial through the many illegal sanctions to the prosecution's foul methods, intensified the prejudicial atmosphere again by referring to the term "cash" in his instructions (R. 152), contrary to the established concept of due process in Michigan.[71]

(D) The trial judge cannot, consistently with due process of law, give undue favoritism to the testimony of the State's witnesses against him and omit mention of State's testimony favorable to petitioner (R. 152-154).[72] Nor can the trial court disregard the force of testimony given by alibi witnesses whose testimony showing petitioner innocent was not discredited. No part of the charge to jury can be designed or worded to the prejudice of the accused in a criminal case.[73] Infringement upon the rule which forbids courts to give undue prominence to particular facts, or a particular branch of the case, falls short of due process.[74]

(E) After the jury had retired to deliberate their verdict, and had been out an hour, the unprecedented occurred. They wanted answered a question, a question that was for them to determine and not of the province of the court (R. 157-162). The spokesman for the jury said, "We can't understand why they should be marked a date of issue August 30, 1933, before the date they were stolen" (R. 156). The prosecution charged the bank was robbed on August 18th. The foreman of the jury obviously meant the travelers' checks were issued prior to August 18th. With irreparable unfairness to petitioner the trial judge, in so many words, told the jurors it was only necessary to consider and decide one side of the case relative to its

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71 People v. Lintz, 244 Mich. 611.

72 Underhill, 3rd Ed. Crim. Ev. 435, stating "* * * the court must not select and give undue prominence to certain parts of the testimony to the exclusion of others of equal importance, but which do not seem as important to the judicial mind.

73 Glasser v. U. S., 62 S. Ct. 457.

74 Campbell v. People, 109 Ill. 565.

essential elements, and that "the date was blank and everything was blank," on the copies of travelers' checks (R. 158). The word blank was not in evidence. The trial court cannot include in his instructions matter of which there is no evidence. Thereupon the trial judge reopened the case to allow an interested witness for the prosecution answer the question, contrary to procedural due process and contrary to the statute providing documentary evidence be accompanied by an authorized representative to identify it (R. 161).[75] Witness Bolt was not an authorized representative for the banks to which the travelers' checks belonged. The trial judge transcended his jurisdiction by invading the province of the jury, for he had no right to discuss with them matters which they alone must decide.[76] His opinion could sway the jurors, and did in this case, depriving petitioner of a fair trial. Because of the transcendency of jurisdiction of the trial court during the trial and in subsequent proceedings, made it imperative for the State appellate court to order the corrective measures. Since the appellate court of the State failed to act, ignored applicable decisions of this Court, as well as its own, review by this Court is necessary.[77]

(12) The State through its appellate court has denied petitioner rights provided by the Constitution and this Court's interpretation thereof.

After the trial judge had arbitrarily denied the motion for a new trial, it was imperative for the state appellate court to review the case and render its opinion. The appellate court of the state refused to hear the matter at all, denied petitioner leave to appeal, contrary to its own judicial interpretations as to what constitutes a reversible error. Petitioner, supported every question raised with imperative authority. Both facts and law, requiring that justice be served, were ignored and the applicable

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[75] Sec. 14249, C. L. Mich. 1929.

[76] Starr v. U. S. 153 U. S. 614; Hicks v. U. S. 150 U. S. 443; Weare v. U. S., 1 Fed (2d) 617, and see Lisenba v. Calif., 62 S. Ct. 280.

[77] Brown v. Mississippi, 297 U. S. 278, 286.

decisions of this Court were disregarded *in toto*.[78] Petitioner was left with no alternative but to resort to a collateral attack by *habeas corpus*, since the ground, upon which it is based, as shown, is in accord with the decisions of this Court.[79]

2.

(Point Two)

The Michigan Supreme Court has decided Federal Questions in this cause in a way not in accord with applicable decisions of this Court.

(1) This Court recognizes that jurisdiction of the State to sustain a commitment is lost, and will issue its writ of certiorari, where, like here, proof is shown that generally the proceedings at the trial and subsequent thereto were so grossly lacking in elements of fairness and justice as to result in depriving petitioner of due process of law.[80]

That petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guarantees protected against State invasion by the Fourteenth Amendment is patent by the record, among other things, tendered therewith. For the State has

(1) disregarded the law of the land;

(2) deprived petitioner of his liberty without due process of law;

(3) denied him equal protection of the laws;

(4) denied him confrontation of witnesses;

(5) suppressed evidence and denied him compulsory process for obtaining witnesses in his favor by withholding information of them;

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[78] Brown v. Mississippi, supra; Powell v. Ala., 287 U. S. 45, 57-59; Glasser v. U. S., 315 U. S. 60, 69; McNabb v. U. S., 317 U. S.—, 63 S. Ct. 614; Tumey v. Ohio, 273 U. S. 510, 535; et al.

[79] Mooney v. Holohon, 294 U. S. 103; Pyle v. Kansas, 317 U. S. 213; Waley v. Johnston, 316 U. S. 101, 105; Walker v. Johnston, 312 U. S. 275; Holiday v. Johnston, 313 U. S. 342; et al.

[80] Smith v. O'Grady, 312 U. S. 334.

(6) divested him of a fair and impartial trial by disregarding the rules of statutory requirements, common law, and established doctrines of legal jurisprudence;

(7) illegally allowed against him evidence that compelled him to be a witness to refute it;

(8) divested him of notice and opportunity to defend;[81]

(9) denied him the right to have a jury of his peers adjudge the new evidence; and

(10) denied him the right to appeal. That the Michigan Supreme Court, ignoring its own precedents and the laws of the State, has refused to hear the matter at all is insuperable of the fact that despotic forces rather than sound legal judgment has unfortunately controlled the case in the State courts.[82]

If the State insists that citizens must obey its law, a citizen has the right to demand that the State itself, through its agents, follow the letter of its laws.[83]

(2) That the Michigan Supreme Court has decided federal questions in this case in a way not in accord with applicable decisions of this Court and has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Under established procedure in *habeas corpus* the state appellate courts are required, on any pretense whatever, to issue and hear a writ of habeas corpus where the petitioner claims his conviction is in violation of the Constitution.[84]

The fact that the State appellate court in this case made some remarks on its order denying the petition for writ of habeas corpus is not enough to satisfy the requirements. Where there has been shown that injustice was

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[81] Simon v. Croft, 182 U. S. 427, 436.

[82] Chambers et al. v. State of Florida, No. 195, 60 S. Ct. 472.

[83] Walker v. Sauvinct, 92 U. S. 90, 23 L. Ed. 678.

[84] Pyle v. Kansas, 317 U. S. 213; Smith v. O'Grady, 312 U. S. 334; Waley v. Johnston, 316 U. S. 101, and collated decisions.

done, appeal becomes essential; the appellate courts must recognize such.[85]

Habeas corpus is not a discretionary process, but a matter of right, requires the court before which it is brought to act and not disregard it as unfounded of claim until the writ itself has been issued and the matter given due judicial inquiry. No court can foresee the merit behind an application for *habeas corpus* without inquiring into the case, fully, as the law provides, as this Court has repeatedly pointed out.

The remarks of the State appellate court on its order refusing to issue and hear a writ of habeas corpus in this case are unfounded. For petitioner, though perhaps regularly charged with a crime, was not lawfully convicted of the crime for which he was tried. It is questionable whether the court of judgment ever had jurisdiction of both person and subject matter at the outset of the proceedings. Notwithstanding such a question, the court of judgment unquestionably lost its jurisdiction during the proceedings in this case.

Irregularities in the trial of a case may not sustain issuance of *habeas corpus*. But where, like here, "the trial is conducted in such manner that is 'shocking to the universal sense of justice' and/or 'offensive to the common and fundamental ideas of fairness and right' " and where, like here, subsequent proceedings have been conducted in a despotic and over-zealous manner not in accord with the concepts of justice, this Court recognizes that due process of law has been denied, and that the judgment of the State against the petitioner is void.[86]

The State appellate court has not recognized the fact that review on *habeas corpus* is not limited to the record of the trial court, as is the case with appellate review, but on the contrary, evidence, *dehors* the record, is admissible. It may consist of oral testimony, depositions and

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[85] Brown v. Mississippi, 297 U. S. 278; Hopt v. Utah, 110 U. S. 574, 583; Simon v. Croft, 182 U. S. 427. 45 L. Ed. 1165. In the latter case, this Court held one charged with crime has sufficient recourse to offer new evidence in support of his innocence, must be observed.

[86] Palko v. Connecticut, 302 U. S. 319, 325, 327.

documentary evidence, in addition to the record of the trial court. Nor has the State appellate court recognized that appeals in habeas corpus proceedings are *sui generis,* in that findings of fact of the court of first instance are not conclusive, but are open to reconsideration on appeal, which to that extent is in effect a trial *de novo.*

That petitioner has already on two separate occasions been allowed to present to the trial court a belated motion for a new trial, and in each instance the motion was denied, is immaterial. That denial of his second motion for a new trial petitioner sought leave to appeal to the State appellate court and was denied and that he sought certiorari to the Federal Supreme Court is, also, irrelevant as to whether the writ of habeas corpus should have issued from the State appellate court.

If the state courts are arbitrary and refuse to grant any sort of relief, regardless of the procedure upon which such relief is sought, and the Federal Supreme Court was required to deny the certiorari heretofore because the appeal was not filed within the time provided by law (*Bentz v. State of Michigan,* 64 S. Ct. 33, 85), what bearing would that have now upon the case where the State has all along and still is holding petitioner illegally imprisoned? Only this: It manifesty shows that the State has all along and still is disregarding the United States Constitution in connection with this case and conducting justice contrary to the applicable decisions of this Court.

CONCLUSION

From the evidence submitted and the allegations and questions raised through the state courts, it is particularly deducible that a sinister force was deliberately put in motion to deny this petitioner fairness and justice as guaranteed by the Constitution by consistently and wilfully denying him relief when the new evidence was brought to light fully exonerating him of the crime. This, together with the flagrant disregard of all semblance of impartiality, the complete neglect to adhere to due process, the absolute aberration from rules of evidence, the wilful disregard for the latitude permitted in "instructions" by

interjection of bias personal opinions, seething with virrulent prejudice, tended, and factually was shown, to make the trial nothing more than a mere pretense of one. Any official who is acquainted with the facts of the case, justly knows this petitioner was "framed" in the fullest sense of the term.

Common sense dictates, and the law is proof, that no guilty man would spend all available time in research of law and judicial interpretation for 12 years, determined to establish and convince the courts of his innocence, if he in reality were guilty. Common sense dictates, and fact and precedent is proof, that no guilty man would spend all available time in searching and probing over 12 years for new evidence to further corroborate his innocence, if he in reality were guilty. In 12 years there has come to light *not* one shred of evidence to substantiate the prosecution's claims. But since the trial petitioner has brought to light an overwhelming amount of evidence, in documentary and affidavit form, which proves beyond a shadow of doubt that he could *not* have been a participant in the crime for which he unjustly is invalidly imprisoned.

Is it not plain that the various actions instituted in this case were denied for the very reason that the trial court concurs in the view that petitioner is innocent of said charge, but that court has refrained from granting relief for bias reasons and in order not to confirm the unequivocal disregard for due process? When courts incline toward such a view justice becomes a hollow mockery. And American jurisprudence has taken one more milestone toward gradual alienation from the principles and rights embodied in the Constitution.

When allegations become truth, supported by facts, a court of law can hardly refute them by a mere gesture without incurring suspicion of being despotic and bias. Past adjudications herein have visibly displayed a feeling of animosity and surging prejudice on the part of the trial court, intermingled with a seemingly superimposed fallacy of conceit and the opinion that "defendant must be guilty otherwise he wouldn't have been identified". This de-

ceptive opinion of the trial court does not meet the facts which glaringly show that the three persons who identified this petitioner have contradicted themselves, wilfully misstated the facts of the case and falsified their testimony to an unbelievable extent. It is hardly conceivable that the tactics used by the State in this case could be construed as having any comparable semblance of American justice.

But how does such contentions affect the jurisdictional question? A rational connection between facts proved and facts presumed, and the comparative convenience of producing supposed evidence of the ultimate fact, are not independent tests of the validity of the whole proceedings. The controlling interpretation here follows that not one iota of actual evidence was before the court and that the trial generally was so grossly lacking in the elements of fairness and justice that the resultant finding of guilt by the biased tribunal was grave departure from elements of due process, a transcendency of jurisdiction on the trial and during subsequent events, and a flagrant violation of procedural rights protected against State invasion by the Fourteenth Amendment.

It is hardly conceivable that a trial court would indulge in a tendency with law enforcement officers to suppress evidence and to search out a way to circumvent constitutional guarantees to obtain and sustain this unwarranted conviction.

The affidavits, letters, and confession of Edward Bentz naming all participants and describing in detail the conspiracy as well as the robbery, fully corroborated by Doyle, checked by the Michigan State Police, together with other, new conclusive evidence tendered therewith, prove beyond the pale of the most skeptical persons that petitioner was convicted upon fabricated hearsay and designed testimony, constituting a false jurisdiction, sustained by flimsy, incompetent and unverified testimony, neither proper nor in harmony with the dignity of American jurisprudence, substantially show that petitioner's conviction was obtained without due process of law. The fact that the State denies him the right to have this evidence decided by a jury

of petitioner's peers is, among the numerous claims made herein, a *prima facie* proof that the State has failed to observe the applicable decisions of this honorable Court.

When jurists of state courts allow their own personal opinions to replace the law of the land and the decisions of this Court, it is self-evident that they have shirked their duty and have weakened the great pillars of wisdom upon which our American system of jurisprudence rests.

Unless the liberty-loving and clear-thinking justices of the highest tribunal of this great nation, those who still cherish and revere the Constitution and believe wholeheartedly in the original American principles for which our sons gave their lives, are willing to combat the despotic forces who are gradually undermining the very foundations of freedom, we may expect to see personal liberty crucified, judicial usurpation of our courts, political emasculation of the people, the order of the day, in a country where personal liberty sat enthroned, a grand and glorious example of the crushed and down-trodden people of the earth.

A reversal of the conviction and sentence in this cause is not only necessary but absolutely imperative if the Constitution and applicable decisions of this Court are to be upheld. Otherwise another feather will be placed in the laureated crown of disintegrating justice.

THEODORE BENTZ,
Petitioner, Pro Se.

Dated this 3rd day
of June, 1946.

Business Address:
Theodore Bentz, No. 46144,
Marquette Branch Prison,
Lock Box 779,
Marquette, Michigan.

ORDER

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the *first* day of *April,* in the year of our Lord one thousand nine hundred and forty-six.

Present The Honorable

Henry M. Butzel,
Chief Justice,

Leland W. Carr,
George E. Bushnell,
Edward M. Sharpe,
Emerson R. Boyles,
Neil E. Reid,
Walter H. North,
Raymond W. Starr,
Assiciate Justices.

In the Matter of

433801/2

Theodore Bentz.

This is an application for habeas corpus by Theodore Bentz, alias Craig. In 1934, he was found guilty by a jury in the Circuit Court of Ottawa County, of committing robbery armed. He was given a life sentence and is now confined in the branch prison at Marquette.

Review of the voluminous record discloses that petitioner was regularly charged and lawfully convicted in a court of competent jurisdiction. The penalty imposed was within the law. Petitioner does not raise any question as to the trial court having had jurisdiction both of the person and subject matter of the case. Instead he goes much into detail as to various matters which he claims were irregularities in the trial of his case, and in particular that the verdict of the jury was not sustained by the proof. Even if petitioner's contention in any of

these respects is well founded, it does not constitute ground for granting habeas corpus. Instead his present petition sets forth only such claimed irregularities or errors as would constitute a basis for a motion for new trial. Petitioner has already on two separate occasions been allowed to present to the trial court a belated motion for a new trial, and in each instance the motion was denied. From denial of his second motion for a new trial in 1943 Bentz sought leave to appeal to this Court. His application was duly considered and denied. Thereafter he sought on two occasions certiorari to the Federal Supreme Court. In each instance his application was denied. While he has designated the present proceedings as an application for habeas corpus, clearly it is nothing more than an attempt to have this Court now review denial in the Circuit Court of his application for a new trial. He has not made any showing which would constitute a ground for granting habeas corpus.

Upon careful consideration of the present proceedings it is ordered and adjudged that the relief sought in plaintiff's petition be and the same is hereby denied.

STATE OF MICHIGAN—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 2nd day of April 1946

(SEAL) (Sgd) Jay Mertz, Clerk.